Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES of America, Ex Rel., SEQUOIA ORANGE COMPANY and Lisle Babcock,

Petitioners,

vs.

SUNKIST GROWERS, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress amended the False Claims Act (FCA) in 1986 to achieve increased enforcement and deterrence by making relators full parties, guaranteeing them a bounty, and protecting their status and rights in the event of Government intervention. Defendants defrauded the Government by making false claims and statements under citrus marketing orders that imposed weekly shipment quotas. Relators filed these actions beginning in 1988 for themselves and for the Government to recover treble damages and statutory forfeitures. Relators spent well over $1 million in costs and fees during the next five years, *inter alia*, winning jurisdictional motions, conducting discovery, and expanding the scope of Defendants' potential liability to several hundred million dollars. The Government intervened late based on its promise not to seek dismissal and to litigate the cases if a satisfactory global settlement could not be achieved. The Government conceded the cases had substantial objective merit, but later renegged and, over Relator's vigorous objections, successfully moved to dismiss for "policy" reasons. The FCA guarantees Relators a share of the proceeds of litigation or settlement and protects Relators' status and rights when the Government intervenes. The dismissals made no provision for either recovery of Relators' costs and fees or for their share. The questions presented for review are:

1. Whether as a matter of statutory construction, § 3730(c)(2)(A) provides the Government with authority, independent of the more specific provisions of the FCA governing dismissals and settlements, to seek dismissals on "policy" grounds.

2. Whether in ruling on the motion to dismiss, the district court can abandon the Federal Rules of Civil Procedure, specifically Rules 12(b), and 56, and substitute the highly

deferential "rational basis" test applicable to determine whether executive action violates substantive due process.

3. Assuming *arguendo* that the Government has the power to dismiss these meritorious cases for "policy" reasons, whether Rule 41(a)(2), in order to avoid prejudice, authorizes the district court to award at least the costs and fees of prosecuting these meritorious FCA suits both for the benefit of Relators and for the Government.

4. Assuming *arguendo* that the district court applied the correct standard, whether a "policy" that attempts to justify dismissal when defendants refused to settle and threatened to refuse to participate in negotiations over future regulatory tools satisfies the "rational basis" test.

PARTIES TO THE PROCEEDINGS

The Petitioners are Sequoia Orange Company and Lisle Babcock, which were the Plaintiffs/Appellants below. The Respondent, United States of America, was one of the Plaintiffs/Appellees below. The remaining Respondents, which were Defendants/Appellees below, are Sunland Packing, San Joaquin Citrus, Central Valley Citrus, Grand View Heights, Lindsay Fruit Association, Ivanhoe Citrus Association, Tri County Citrus Association, H & R Citrus, Baird-Neece Packing, Grand View Packing, Sierra Citrus, Klink Citrus, Golden State Citrus, Magnolia Citrus, Visalia Citrus, Orange Cove Packing, Strathmore Cooperative, Sunland Packing, Harding & Leggett, Mission Citrus, Dole Citrus, Blue Banner, Baker Bros. Citrus, Kaweah Citrus, Oxnard Lemon Association, Strathmore Packing, Stark Packing Corp., Stark Packing, Millwood Packing, Ventura Pacific, Saticoy Lemon, Golden Valley, Ventura County, Limonera Co. and Sunkist Growers, Inc.

Petitioner, Sequoia Orange Company, has no parent company and no nonwholly owned subsidiaries.

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Petitioners are Relators in these 34 actions brought under the False Claims Act (FCA), 31 U.S.C. § 3729, *et seq.*, to recover damages and forfeitures resulting from false claims and statements by Defendants in citrus marketing orders issued by USDA under the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. § 601, *et seq.* Even though USDA conceded the cases were objectively meritorious, it moved to dismiss them for "policy" reasons. The district court granted USDA's motions, holding that the protections and standards in Fed. R. Civ. Proc. Rules 12, 41, and 56 did not apply. The Ninth Circuit affirmed. Relators respectfully petition for a writ of certiorari to review the improper dismissal of these actions. The Ninth Circuit's opinion should be vacated and these cases remanded with instructions that Relators' interest in these cases, as directed by Congress, are to be protected by both the Civil Rules and the FCA.

OPINIONS BELOW

The district court's March 3, 1995 opinion (App. C) ruling that the Federal Rules did not apply to USDA's motion is unreported. The district court's Sept. 27, 1995 opinion (App. B) dismissing the cases is reported at 912 F. Supp. 1325 (E.D. Ca. 1995). The Ninth Circuit's June 19, 1998 opinion (App. A) is not yet published but is reported at 98 Daily Journal D.A.R. 6688 and 1998 WL 326866. The judgments are located at Apps. D-Q. The district court's Oct. 26, 1995 opinion (App. R) denying leave to amend the complaints, inter alia, on the ground that such motions are not allowed in FCA cases is unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its opinion and judgment on June 19, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The relevant provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.*, are found in § 3730. The relevant Federal Rules of Civil Procedure, issued under the Rules Enabling Act, 28 U.S.C. § 2072, are Rules 1, 12, 41, and 56. These statutes and rules are reproduced in App. T.

STATEMENT OF THE CASE.

A. The False Claims Act.

Congress substantially amended the FCA in 1986 to restore and enhance the role of relators in the war against waste, fraud, abuse, and corruption. Congress was indeed prescient in its concern that normal federal enforcement was occasionally ineffective and that bureaucrats motivated by, e.g., bad faith, ill will, or simply a desire to cover up past mistakes or dirty laundry, might try to interfere with legitimate relator enforcement. In order to accomplish its purpose, Congress wisely provided several mechanisms to protect relators and ensure that all meritorious cases were prosecuted. Congress provided that a relator may unilaterally initiate action and brings the action for himself as well as for the government. § 3730(b)(1). The government has the unfettered right to take over an action during the initial 60-day sealing period, § 3730(b)(2), plus court-approved extensions based on the government's showing of "good cause," § 3730(b)(3). It has primary responsibility for the action in such cases, § 3730(b)(4)(A), *but the relator remains a full party*. § 3730(c)(1). Under the previous version of the statute, the relator lost all right to participate and to a share if the Government took over the case or if the Government had the information on which the case was based. Under the amended FCA, the relator remained a party under all circumstances, and was guaranteed a share of the settlement or

judgment plus attorney fees and expenses. § 3730(d)(2). If the Government decides not to initially intervene, then the action is conducted by the relator as sole party, with the Government retaining a right to receive pleadings and depositions. Congress stressed the importance of the role of the relator in conducting the action that it stated this right *twice*. §§ 3730(b)(4)(B), 3730(c)(3). The Government may intervene at a later time, but only with court approval based upon a showing of "good cause." The "status and rights" of the relator must be protected and may not be limited. § 3730(c)(3). If the Government chooses to pursue the claim with an alternative fraud remedy, e.g., in an administrative proceeding, the relator is guaranteed the same participation rights, including a share of the recovery. § 3730(c)(5).

The Justice Department (DOJ) led the fight to restrict jurisdiction with the 1943 amendments and opposed the expanded authority and protection for relators in the 1986 FCA amendments. Interpreting § 3730(c)(2)A) to grant dismissal authority independent of the FRCP and the jurisdictional bars elsewhere in the FCA would undermine the Congressional objectives, eviscerate the protection for relators built into the 1986 amendments, and would give the government authority it lost in Congress and in this Court. Unless this Court allows the writ and reverses the Ninth Circuit, DOJ will use its new-found independent dismissal authority to (as in these cases) throw out relators at or near the end of litigation, to extract unreasonable conditions from relators, to "win" fights with relators (such as public employees) which it has lost under the specific provisions of the FCA, and generally to politicize *qui tam* litigation between an often self-interested agency and usually exceptionally angry and aggressive defendants. Neither USDA's hasty abandonment of its prior construction of § 3730(c)(2)(A) nor the lower courts' uncritical acquiescence should rebalance the bargain between government and relators struck by Congress in the 1986 amendments.

B. The Agricultural Marketing Agreement Act.

Sequoia Orange Company (Sequoia) brought 33 of these consolidated actions against Sunkist and its member packinghouses beginning in December, 1988. An additional action was brought by Lisle Babcock against Dole Citrus. Each of the pattern complaints alleges that the Defendants (Sunkist packinghouse, both in a conspiracy with Sunkist and separately, and Dole Citrus) failed to report or falsely reported their citrus shipments (oranges and lemons) to USDA.

USDA imposed quotas on the weekly and seasonal shipment of oranges and lemons grown in Arizona and California between the Depression and December, 1992.[1] The quota regulations were issued under marketing Orders authorized by the Agricultural Marketing Agreement Act of 1937.[2]

The object of the false reporting scheme was to obtain more quota and to avoid paying penalties and forfeitures[3] equal to the market value of citrus shipped in excess of quotas. App. 28a.

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1. Secretary Madigan suspended the quotas for the remainder of the season on December 14, 1992. Secretary Espy announced in June 16, 1993 that the quota suspension would continue until the industry could agree on new quota and enforcement rules. Secretary Espy finally terminated the three citrus Orders altogether on August 26, 1994, citing massive cheating and continued divisiveness over the necessity and efficacy of quotas.

2. The operation of the AMAA, Orders, and quota regulations are described in more detail in the following cases: *Sequoia v. Yeutter*, 973 F.2d 752 (9th Cir. 1992); *Riverbend v. Madigan*, 958 F.2d 1479 (9th Cir. 1992); *United States v. Riverbend*, 847 F.2d 553 (9th Cir. 1988); *Pescosolido v. Block*, 765 F.2d 825 (9th Cir. 1985); and *NOAC v. Exeter Orange Co.*, 722 F.2d 449 (9th Cir. 1983).

3. 7 U.S.C. §§ 608a(5), 608c(14).

Defendants thus made both direct and so-called "reverse" false claims actionable under 31 U.S.C. §§ 3729(a)(1), (2), (3), and (7). Defendants devised a diabolical scheme to cheat both USDA and their competitors. Sunkist controlled the industry administrative committees, which in turn controlled the level of quota and the enforcement/compliance function. It was almost the "perfect crime." They could cheat with impunity, but for the False Claims Act's post-1986 revival of qui tam enforcement.

"The government was originally hostile to Sequoia's suits." App. 90a. USDA moved to dismiss the Sunland "test" case, claiming there was no jurisdiction under the FCA to punish false claims and statements made in connection with quota programs imposed under the AMAA. The Court denied USDA's motion on July 5, 1989. Defendants made a similar motion, which was denied on July 25, 1990. USDA renewed its motion to dismiss in connection with the four lemon Order cases, hoping for a different ruling from a different district judge. USDA's motion to dismiss was again denied on May 5, 1992.

The orange Orders were ultimately held unenforceable based on USDA's July 24, 1984 finding pursuant to 7 U.S.C. § 608c(16)(A), that, without several amendments, they no longer effectuated the purposes of the AMAA. App. 32a. *Sunny Cove v. Espy*, 854 F. Supp. 669, 697 (E.D. Cal. 1994). USDA reversed its position on jurisdiction in a memorandum dated November 3, 1992, App. 31a, which was submitted to the Court on the question of the continued enforceability of orange quotas following the Ninth Circuit's decision in *Sequoia v. Yeutter*, 973 F.2d 752 (9th Cir. 1992). USDA argued that the FCA cause of action would survive the unenforceability of the quotas under the AMAA because the FCA provided an effective alternative remedy, relying on *United States v. Kapp*, 302 U.S. 214 (1937) (false claims under predecessor to AMAA).

USDA proposed a "global settlement" offer (covering both FCA cases brought by Relators and AMAA cases brought by USDA) on June 18, 1993, App. 30a, and moved to intervene in these FCA cases. The Court granted permission to intervene on September 13, 1993, App. 30a-31a, based in part on representations by the Assistant U.S. Attorney that he would effectively litigate these FCA cases whether or not settlement was reached. USDA's Deputy AMS Administrator Clayton specifically promised that

> [w]e have not, and will not, recommend a blanket amnesty for past prorate violations, since the violations alleged are substantial and evidence a willful and flagrant disregard for binding federal regulations.

App. 68a, 95a-96a. USDA thus further acquiesced in and agreed with Sequoia's position[4] that the Court has jurisdiction over these cases.

Sequoia vigorously objected to intervention, claiming that USDA was trying to force a "sweetheart deal." App. 31a. Sequoia's fears were more than well-founded, USDA having delivered the ultimate "deal" to Defendants of the forced dismissals at issue here.

Various settlements were attempted during the year preceding USDA's motion to dismiss, ranging from approximately $3 to $20 million. USDA unexpectedly announced on May 16, 1994, that it was terminating all three California-Arizona citrus orders, dismissing all pending AMAA cases, and withdrawing from the

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4. Examples include USDA's memorandum supporting its motion to intervene, its Third Amended Complaint in Magnolia, and oral representations made to the Court during the August 9, 1993 hearing on USDA's motion to intervene and during the January 28, 1994 hearing on Sequoia's motion to amend the existing complaints.

pending FCA cases so that Relators could continue prosecution. App. 70a. These 34 FCA cases would continue to be prosecuted by Relators. Although couched as a single "policy," these were actually separate decisions taken for separate reasons. USDA's "decision" to dismiss the AMAA cases was not a voluntary amnesty program, but was instead the result of judicial invalidation of post-1984 quotas. USDA had to drop its AMAA claims because it refused or was unable to provide the explanation and/or engage in corrective rulemaking following the Court's decision in *Sunny Cove v. Espy*, 854 F. Supp. 669 (E.D. Cal. 1994) invalidating shipment quotas. Finally, the Orders were terminated because any further use of quotas was economically unjustified and too divisive, and because of the massive cheating revealed in these cases. App. 34a. 59 Fed. Reg. 44020 (Aug. 26, 1994).

Defendants immediately mounted a campaign (including grassroots letters, intervention through counsel, and Congressional letters) to get these FCA cases dropped. An internal USDA briefing paper prepared by the Office of General Counsel after the May 16 announcement correctly stated that USDA lacked the legal authority to seek dismissal of these meritorious cases. Other agency constructions of the FCA, an internal Department of Justice memo and Congressional testimony by DOJ's Gerson, confirmed that § 3730 did not provide an independent basis to seek dismissal on "policy" grounds.

Pressure and political influence eventually prevailed over Constitutional duty and USDA's prior commitments to the district court. USDA General Counsel Gilliland wrote to Assistant Attorney General Hunger on May 20, 1994 to request dismissal of these cases:

> Throughout our consideration of the legal and factual circumstances surrounding these cases, it has been the Department's understanding that the False

> Claims Act does not provide the government with an alternative statutory basis to achieve dismissal of these cases. Counsel for several *qui tam* defendants have recently suggested to us and to your staff that the False Claims Act (31 U.S.C. § 3730(c)(2)(A)) may in fact contain additional authority for the government to seek and achieve dismissal. We are therefore requesting your advice on this issue. If a government motion to dismiss all *qui tam* cases is authorized by this provision, or any other provision of the False Claims Act, the Department of Agriculture would strongly support such a motion.

DOJ's Assistant Director, Commercial Litigation, Steve Altman wrote to defense counsel Manock on August 1, 1994 analyzing litigation risk for Defendants of at least $30 million. He concluded:

> Finally, as I have stated, I do not believe that dismissal of these cases would end litigation between Sequoia and Sunkist. Sequoia has already stated that it will refile RICO, antitrust and common law actions. In addition, you have argued that the government should treat your clients like all other AMAA violators. This would be accomplished if the United States accepts your request that it take no portion of the proceeds of a settlement. Your clients would then be in a position of settling a private action, as if the *qui tam* actions had not been filed. I have stated I would recommend this — but it is up to your clients to make this happen. When you consider the substantial costs and risks involved in not settling now, I think that a settlement at a number far above those you are considering [$1,5 million] is in everyone's best interest.

Defense counsel Wilkinson wrote back on August 3, ER 365-378, making the incredible claim that the cases had to be dismissed because settlement talks had proven

> fruitless. . . . The only avenue left to end the acrimonious litigation involving the terminated citrus marketing orders is an announcement by the United States that it will move to dismiss the outstanding [and future FCA cases].

USDA moved to dismiss these cases on August 31, 1994, claiming an absolute right to force a dismissal under § 3730(c)(2)(A). Judge Wanger held a hearing on the motion on October 24, 1994. He rejected USDA's argument in his March 3, 1995 opinion, App. 86a, 102a-107a, but scheduled an evidentiary hearing to permit USDA to prove that forced dismissal served a legitimate governmental interest, and was not arbitrary, capricious, or illegal. He paid lip service to the desire of Congress that meritorious cases be prosecuted by relators despite governmental inability, unwillingness, or lack of political will,[5] but cobbled

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5. Additional grounds for an evidentiary hearing can arise upon a showing that the dismissal is unreasonable in light of existing evidence or that the Government has not fully investigated the allegations. Both of these grounds concern whether the dismissal is rationally related to a legitimate governmental interest. . . . The purpose of the FCA is to combat fraud against the Government. Congress enacted the *qui tam* provisions to ensure that fraud would be prosecuted even if the Department of Justice was unable or unwilling to pursue the case. The 1986 Amendments to the FCA, and the *qui tam* provisions generally, support the prosecution of meritorious cases. . . . Congress, wary of erosion of the Department of Justice's political will to prosecute certain cases, sought to prevent the arbitrary dismissal of meritorious cases. . . .

App. 114a.

together a standard more akin to judicial review of agency rulemaking than to the familiar standard under the FRCP governing judicial decisions dismissal/summary judgment motions. A four-day hearing was held in June of, 1995. App. 35a. He granted USDA's motions on September 27, 1995. App. 81a-84a. Sequoia asked the Court for an opportunity to amend the Complaints to allege non-FCA actions and for an FRCP 54(b) order of partial finality to permit an appeal to this Court of the FCA dismissal while the remainder of claims proceeded forward free of USDA intervention. Judge Wanger ruled on October 26, 1995 that Sequoia had no right to amend the Complaints because of its status as an FCA relator. App. 151a.

The Ninth Circuit affirmed on June 19, 1998. The Court correctly observed that the FCA requires a hearing on USDA's motion and that it provides no standard different from the Federal Rules for ruling on the motion. App. 6a. However, it went on to approve the highly deferential standard for ruling on USDA's motion to dismiss, claiming that standard is the same as applied to determine whether executive action violates substantive due process, App. 11a-13a, and the minimal scrutiny given to the exercise of prosecutorial discretion, App. 11a-13a. The Court did not analyze or explain why USDA's motion was not governed by Rules 12 and 56. Regarding the applicability of Rule 41(a)(2) (protection against prejudicial dismissals), the Court wrongly commented in passing, App. 11a, that the Rule only protected defendants from prejudice, not plaintiffs. The panel did not address the district court's conclusion that FCA relators could not amend their complaints to allege non-FCA causes of action. App. 16a.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the district court's decision to abandon the decisional standards and protections of the Federal Rules of Civil Procedure and the FCA completely upsets the

enforcement scheme established by Congress, not only in these cases (excusing and rewarding what USDA described as "massive" cheating by a politically powerful segment of the citrus industry) but in every qui tam case in the future. Unless corrected by this Court, the district court's abandonment of the traditional judicial function will eviscerate the FCA of its incentives and protections for relators and leave them to the mercy and whim of the Executive Branch — contrary to the language and intent of Congress. As a case of first impression, this Court should address the questions presented by these cases now because of their importance to the future of the FCA. Moreover, the district court's departure from the protection afforded by the Federal Rules calls for an exercise of this Court's supervisory power. Finally, the Ninth Circuit's decision conflicts with established precedent in this Court. Reversal is vital to the FCA's qui tam enforcement scheme.

I.

THE LOWER COURTS WRONGLY DECIDED AN IMPORTANT FEDERAL QUESTION OF FIRST IMPRESSION.

a. The Ninth Circuit erroneously concluded that USDA's motion to dismiss was not governed by the Rules of Civil Procedure. The plain text of the FCA and its legislative history demonstrate that meritorious cases cannot be dismissed on "policy" grounds. The absence of an express standard for decision in the FCA did not leave the district court free to adopt its own standard.

As a matter of routine statutory construction, the FCA does not allow for dismissal of meritorious cases on "policy" grounds.[6]

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6. In the only two reported decisions on point, both involving the pre-1986 version of the FCA, the courts categorically rejected non-jurisdictional "policy" dismissals similar to these cases. *U.S. ex rel. Weiss*

(Cont'd)

First, the many specific dismissal provisions in the FCA, *e.g.* § 3730(e)(4) (prior public disclosure), argue against any additional independent basis for dismissal in § 3730(c)(2)(A). Second, such a loophole produces an impermissible absurd result. While *settlements* of meritorious cases under § 3730(c)(2)(B) must be fair, adequate, and reasonable under all the circumstances, a "policy" dismissal for $0 would completely undermine the protection of the standard for meritorious settlements. All of USDA's "policy" considerations should have been analyzed against this settlement standard in § 3730(c)(2)(B).

Congress was not silent on the matter of what standard should be applied to USDA's motion to dismiss. While earlier versions of the 1986 FCA amendments made the hearing on the motion optional, requiring a threshold showing by relator, the plain text ultimately adopted made the hearing mandatory. As noted above, the legislative history to the final version explained that Congress sought to achieve greater enforcement by making relators full parties protected by the Federal Rules.

> The final version of the Bill preserves and strengthens the role of the person initiating the action

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(Cont'd)

v. Schwartz, 546 F. Supp. 422, 428 (N.D. Cal. 1982) (vacating stipulated dismissal between government and defendants; "Congress intended for the honest informer to retain his right to prosecute fraud against the Government. That right may be taken over, but it may not be taken away."); *U.S. ex rel. Coates v. St. Louis Clay Prod. Co.*, 58 F. Supp. 902, 904-05 (E.D. Mo. 1946) ("The purpose of the informer statute, as now on the books, is to permit citizens to prosecute this class of action when the Government has failed to do so by failure either to initiate or to take over."); *Sherr v. Anaconda Wire & Cable Co.*, 149 F.2d 680 (2d Cir. 1945); *United States v. B F Goodrich Co*, 41 F. Supp. 574, 575 (D.C.N.Y. 1941). Logically, "policy" dismissals must be rejected with even greater vigor in view of the upgrades and protections for relators provided by Congress in 1986.

> even if the Government enters the case. The law makes clear that this person ("qui tam" plaintiff) will be a "party" to the action with all the rights and responsibilities that a party receives under the Federal Rules of Civil Procedure.

132 Cong. Rec. H9388 (Oct. 7, 1986) (relevant portions of the conference report are reproduced in App. U, 179a). *See also, e.g.*, S. Rep. No. 345, 99th Cong., 2d Sess. at 4-8, 23-26 (1986) reprinted in U.S. Code Cong. and Admin. News p. 5266; H.R. Rep. No. 660, 99th Cong. 2d Sess. at 22-24, 30-31; 132 Cong. Rec. H6482 (Sept. 9, 1986) (Rep. Berman), *id.* at H6483 (Rep. Bedell), S11243 (Aug. 11, 1986) (Sen. Grassley), S15036 (Oct. 3, 1986) (Sen. Grassley).

Aside from unequivocal Congressional intent to protect relators as parties under the Federal Rules, nothing in the FCA repeals these rules, which have the force and effect of law. *See, e.g., Leatherman v. Tarrant County Narcotics Unit*, 113 S. Ct. 1160 (1993) (no heightened pleading requirement in civil rights cases; ordinary FRCP standards govern); *Griffith Co. v. NLRB*, 545 F.2d 1194 (9th Cir. 1976); *Crescent Wharf & Warehouse Co. v. Pillsbury*, 259 F.2d 850 (9th Cir. 1958); *American Fed. of Musicians v. Stein*, 212 F.2d 679 (6th Cir. 1954); *Hicks v. Bekins Moving & Storage Co.*, 115 F.2d 406 (9th Cir. 1940); *see also Hanna v. Plummer*, 380 U.S. 460 (1965).

b. Assuming, arguendo, that USDA could as a theoretical matter seek dismissal of these meritorious cases, then the Ninth Circuit mistakenly concluded that the protection against prejudice afforded by Rule 41(a)(2) did not apply to Relators. Although the panel correctly conceded that Relators were prejudiced by precluding their bounty, App. 11a, it limited the scope of Rule 41(a)(2) to protect defendants against vexatious plaintiffs, App. 11a. It based its narrow construction on a misreading of this Court's opinion in *Cooter & Cell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1992). *Hartmarx* is totally inapposite. The dismissal in *Hartmarx*

was a voluntary dismissal pursuant to Rule 41(a)(1) because the defendant had not yet filed an answer or motion for summary judgment. The defendants in the instant cases have filed answers thereby making Rule 41(a)(2) applicable. That rule conditions dismissals "upon such terms and conditions as the court deems proper." Nothing in the text of the rule limits its protection to defendants. Indeed, Rule 41 speaks generally in terms of preventing voluntary dismissals after service by an "adverse party" of an answer or a motion for summary judgment and allowing voluntary dismissals without court order only by stipulation "signed by all parties."

The panel failed to address the recent Ninth Circuit case. *Joanna Russ v. Standard Insurance Company, an Oregon Corporation*, 120 F.3d 988 (9th Cir. 1997) (reversing Rule 41(a)(2) dismissal because it was sought for the improper purpose of renewing an untimely jury demand). The Court held that the general authority to grant and condition dismissals in Rule 41(a)(2) must give way to the more specific limitations in other Rules, i.e. the requirement in Rule 38 for a timely jury demand. Applied to these cases, dismissal should have been denied because the purpose of the motion was to circumvent the restrictions in Rules 12 (both defendants and USDA having lost previous motions) and 56 that prevent the forced dismissal of meritorious cases. As in *Russ*, USDA is improperly trying to achieve indirectly what it could not achieve directly under Rules 12 and 56. *Id.* at 990.

As noted above, nothing in Rule 41 limits its protection to defendants. The panel also failed to address the plain text of the Rule and cases which explain that the Rule requires the district court to consider the equities of all parties. *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997) (district court abused its discretion by not considering equities facing both defendants and plaintiffs). Relators are aware of no caselaw that supports the panel's narrow construction of Rule 41(a)(2) that excludes

plaintiffs from its protection. *Cf.* 9 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 2364 at 278, 297 (2d ed. 1994); Wright & Miller, Federal Practice and Procedure § 2362 (action can be dismissed "when no other *party* will be prejudiced."); *see, e.g., Austin v. Pa. Dept. of Corrections*, 876 F. Supp. 1437 (E.D. Pa. 1995); *Burnette v. Goldshall*, 828 F. Supp. 1439 (N.D. Ca. 1993); *Greenberg v. Centrum Inv. Group, Inc.*, 145 F.R.D. 610 (S.D. Fl. 1993); *Read Corp. v. Ribco Equip. Co.*, 145 F.R.D. 288 (D.N.H. 1993); *Beaver Associates v. Cannon*, 59 F.R.D. 508 (S.D.N.Y. 1973) (absent current and potential class members); *Hudson Engineering Co. v. Bingham Pump Co.*, 298 F. Supp. 387 (S.D.N.Y. 1969) (other plaintiffs); *In Re Phillips Pet. Secs. Lit.*, 109 F.R.D. 602 (D. Del. 1986) (other plaintiff class members).

There is no dispute that Relators suffered legal prejudice as a result of these dismissals. Once such legal prejudice was conceded, dismissal should have been denied (in favor of settlement, for example) or the district court should have devised "terms and conditions" to protect Relators. *Westlands Water Dist. v. United States*, 100 F.3d 94, 98 (9th Cir. 1996) (Judge Wanger ordered to grant Rule 41(a)(2) motion and remanded for calculation of attorney fees and costs); *Cantrell v. Intl. Bhd. of Elec. Workers, AFL-CIO, Local 2021*, 69 F.3d 456 (10th Cir. 1995); *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993) (requiring compensation for work rendered useless). At a minimum, Relators were entitled to a "make whole" award of fees and expenses under this Rule. *See, e.g., In re Lowenschuss*, 67 F.3d 1394, 1403 n.5 (9th Cir. 1995); *Kern v. TXO Production Corp.*, 738 F.2d 968, 972 (8th Cir. 1984) ("The rule has long prevailed in both law and equity that a plaintiff may dismiss the case without prejudice only by payment of the costs. . . ." *quoting Home Owners' Loan Corp. v. Huffman*, 134 F.2d 314, 317 (8th Cir.1943)).

The panel's claim that the deferential "rational relation" test avoids any separation of powers concerns is also wrong. This Court

rejected the idea in *Morrison v. Olson*, 487 U.S. 657 (1988), that the executive must have the power to stop litigation. The separation of powers doctrine is not violated so long as the executive retains "sufficient control" over litigation. The Ninth Circuit applied this analysis to uphold the FCA against a separation of powers attack in *U.S ex rel. Kelly v. Boeing*, 9 F.3d 743 (9th Cir. 1993). The "sufficient control" afforded the executive in FCA cases, which includes the power to settle measured by the district court against a reasonableness standard, § 3730(c)(2)(B), and the power to dismiss a case that "has no merit," *id.* at 753, is well within the outer boundaries sketched by this Court in *Morrison*. *See Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688 (9th Cir. 1997) (Congress in Indian Gaming Regulatory Act properly authorized state governors with "veto" over certain decisions by Secretary of Interior regarding Indian gaming). The Ninth Circuit analogized a governor's "veto" power under IGRA to the authority of relators under the False Claims Act upheld against constitutional challenges in *U.S. ex rel. Kelly v. Boeing*, 9 F.3d 743, 758-59 (9th Cir. 1993), in which

> this court was called upon to interpret "significant authority" in the context of qui tam relators under the False Claims Act. The Act authorized individuals to sue on behalf of the federal government for vindication of public rights. Although the Federal Government is given the opportunity to intervene in the lawsuit, the individual relator has the opportunity to continue the lawsuit even if the Government believes that such a suit is not warranted. We determined that the authority exercised by relators was not so significant as to require appointment.

The panel's crabbed construction of § 3730(c)(2)(A) raises the far more serious constitutional concern. The ability to forcibly

stop litigation violates the duty imposed by the Framers on the Executive to take care that the laws be faithfully executed. U.S. Const., Art. I, § 3. The Executive's constitutional duty to faithfully execute the laws does not authorize abandonment[7] of that duty. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 578-79 (1952) ("To 'execute' a statute . . . emphatically does not mean to kill it."); *see also* Miller, *The President and the Faithful Execution of the Laws*, 40 Vand. L. Rev. 389, 397-398 (1987); Declaration of Independence, July 4, 1776 (condemning King for having "refused his assent to laws, the most wholesome for the public good"). USDA's attempt to wrap its political desire to sanction Defendants' lawlessness in constitutional cloth lies between irony and the arrogance of a supreme monarch exercising the royal dispensing power.

The "royal dispensing power" which USDA here seeks to revive and reclaim is utterly abhorrent and alien to the American ideal of Rule of Law, and had been repeatedly condemned by the courts. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 545-47, 612-13 (1838) (duty to faithfully execute the laws does not include the power to ignore them); *Ameron, Inc. v. Corps of Engineers*, 610 F. Supp. 750 (D.N.J. 1975), *affirmed*, 787 F.2d 875, *modified*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 109 S. Ct. 297 (1988); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1119, 1121, 1123-24 (9th Cir. 1988), *vacated on other grounds*, 893 F.2d 205 (9th Cir. 1988) (en banc). *See also United States v. Smith*, 27 F. Cas. 1192,

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7. Even in *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (subject to control by Congress, agency decision not to initiate prosecution normally not reviewable under APA), the Court warned against an express policy like USDA's "that is so extreme as to amount to an abdication of its statutory responsibilities." *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (allegation that agency adopted policy that abdicated its statutory enforcement duty, not a challenge to the exercise of discretion in a few cases in a generally effective enforcement program).

1230 (Cir. Ct. D.N.Y. 1806); *De Costa v. Nixon*, 55 F.R.D. 145, 146 (E.D.N.Y. 1972); *Catano v. Local Board*, 298 F. Supp. 1183, 1188 (E.D. Pa. 1969). Thus, Judge Wanger's conclusion, that "[t]he ultimate choice to forego prosecution of lawbreakers is political, vested in the Executive Branch, which possess the power to grant amnesty" is contrary to our historical tradition, the Constitution's express commitment of powers and duties to the three branches, and has been flatly rejected by the Supreme Court.

This Court relied on *Morrison* in its seminal constitutional analysis in *U.S. ex rel. Kelly v. Boeing*, 9 F.3d 743, 755-57 (9th Cir. 1993). This Court found the qui tam mechanism constitutional because the Executive retained "sufficient control" over FCA litigation and the roles of relators and the judiciary were well within the bounds marked by Morrison. The reference in this Court's analysis to the Executive's ability to seek dismissal of cases "that lack merit" triggered the Rule 56 standard. A prohibition on policy dismissals outside the protection of the Federal Rules is the logical result of this Court's extensive analysis in *Kelly*, and is still well within the bounds approved in *Morrison* because Congress in the Ethics Act denied the Executive any power to stop cases. Relators' construction does not change the Kelly analysis in any way. USDA still has all the various "control" mechanisms identified as "sufficient" in *Kelly*. The one "power" it can't exercise is abandonment of the law.

c. Finally, the panel misapplied the rational basis test. It concluded first that "[p]eace among competitors and regulators facilitates orderly marketing." App. 13a. But every policy statement from USDA and the caselaw emphasize that the hallmark of these marketing orders, especially the ones like these involving the greatest displacement of competition, is strict and full enforcement. There can be no compliance and deterrence without meaningful detection and litigation. Indeed, the Secretary cited the widespread noncompliance and massive cheating as the basis for the ultimate termination of these programs.

The panel next dismissed Relator's claim that the decision to seek dismissal was tainted by improper political influence. App. 14a. But the panel completely failed to analyze the record evidence that showed that the only intervening factor between USDA's May 16, 1994 decision to withdraw from the FCA cases and its May 20 decision to seek dismissal was pressure from the industry's largest and most powerful cooperative, Sunkist, a long-time "client" to which USDA deferred in matters of local administration. App. 39a-42a, 71a-75a. Thus, all of the factors ultimately offered by USDA to allegedly justify the dismissal decision were mere pretext.

The panel next succumbed, again without any analysis, to USDA's claim that forced dismissal was the only equitable solution. It is obviously inequitable to the 75+ companies who did not cheat, and to the dozens of companies that settled enforcement actions over the years, to allow the 34 companies, Defendants in these actions, to keep their ill-gotten gain from the citrus black market. Even among the cheaters, some violations were quite large while others were relatively minor. The panel completely fails to explain why a reasonable global settlement, submitted for district court approval, was not the rational solution.

The panels uncritical acceptance of USDA's alleged "litigation burden" justification suffers this same defect, i.e. why not settle rather than dismiss. App. 14a-15a. The record doesn't contain even a shred of cost-benefit analysis to support USDA's claim. While the Government certainly has the right to plan and/or abandon its litigation efforts on the basis of resource decisions, one of the key reasons for the 1986 FCA amendments was Congress' desire to enlist private resources in the anti-fraud enforcement effort.

Finally, the panel approved USDA's dismissal of the 4 lemon cases even though that program concededly did not suffer from many of the legal deficiencies that had rendered the orange

regulations unenforceable (except under the FCA). App. 15a. USDA had nothing but vague suspicions that the black market was as widespread in the lemon industry. Even if their had been solid proof, the solution for greater cheating is greater enforcement, not wholesale abandonment.

II.

THE NINTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH CONTROLLING PRECEDENT FROM THIS COURT.

The Supreme Court recently warned the lower courts not to invent new decisional standards, based on seemingly prudent policy considerations, in place of the standards set forth in the Federal Rules. *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997) (requirements for class certification under Rule 23 must be satisfied in determining propriety of certification of settlement-only class).

The Court just last term in *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 117 S. Ct. 1871(1997), approved of the Relators' interest under the FCA as separate and distinct from that of the federal prosecutor, at least implicitly rejecting the Ninth Circuit's reliance on the unfettered prosecutorial discretion of the so-called "real" party in interest:

> The extension of an FCA cause of action to private parties in circumstances where the action was previously foreclosed is not insignificant. As a class of plaintiffs, qui tam relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good. As we have previously recognized:

> "[Qui tam statutes are] passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel." United States ex rel. Marcus v. Hess, 317 U.S. 537, 541, n. 5, 63 S.Ct. 379, 383, n. 5, 87 L.Ed. 443 (1943) (quoting United States v. Griswold, 24 F. 361, 366 (D.Or.1885)).

Qui tam relators are thus less likely than is the Government to forego an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc. [footnote 5: That a qui tam suit is brought by a private party "on behalf of the United States," see Brief for Respondent 17, does not alter the fact that a relator's interests and the Government's do not necessarily coincide. Moreover, as the statute specifies, qui tam actions are brought both "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1) (emphasis added).]

In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued.

Id. at 1877-78.

The Supreme Court rejected USDA's "control" and "policy" arguments long ago in the seminal case of *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 547 (1942) (rejecting government claim that allowing relator without any original information to force civil litigation following criminal prosecution impermissibly interfered with executive function and prosecutorial discretion). This Court explained:

> The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did. It is said that effective law enforcement requires that control of litigation be left to the Attorney General; that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863. But the trouble with these arguments is that they are addressed to the wrong forum.

Id. at 547. *See* App. 183a (excerpts of U.S. Amicus brief in *Marcus v. Hess* for unsuccessful argument for seeking dismissal authority on Policy grounds.)

III.

THE STANDARD APPLICABLE TO MOTIONS TO DISMISS IS A QUESTION OF FIRST IMPRESSION AND ONE OF VITAL IMPORTANCE TO THE FCA ENFORCEMENT SCHEME CRAFTED BY CONGRESS THAT SHOULD BE SETTLED NOW BY THIS COURT.

The decision in these case is not only important to the future of the citrus industry, but to hundreds of cases now pending under the FCA and countless thousands to be brought in the future.[8] These 34 cases represent hundreds of millions of dollars worth of wealth transfer as a result of the black market that went unchecked for years. These Defendants retain a huge economic advantage over their competitors, especially valuable as the industry moves from two generations of strict quotas to a free market. Most fundamentally, there can never be that illusive "peace" sought by USDA until there is a measure of justice from the companies that broke the rules, especially since Sunkist and its houses had majority control over industry administrative committee decisions. How can the "independents," and even the honest members of Sunkist, trust USDA to fairly administer a future regulatory program when so many past violations remain unremedied?

Far more important, if let stand, this decision will adversely affect every pending FCA case and all those yet to be filed. The

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8. According to DOJ statistics as of October, 1997, total recoveries from 2000 qui tam cases filed since the 1986 amendments to the FCA exceeded $1.83 billion. An economic analysis prepared by Taxpayers Against Fraud of the impact of the 1986 amendments estimates that qui tam recoveries over the next decade will range between $6.9 and $9.3 billion. Deterrence of fraud due to the qui tam provisions of the amended Act for their first ten years of existence (1986-1996) is estimated as between $35.6 billion and $71.3 billion, and for their second ten years of existence (1996-2006) is estimated as between $105.1 billion and $210.1 billion, even assuming a conservative estimate of deterrent effect.

Government's ability to dismiss FCA cases with only "rational basis" scrutiny effectively eviscerates the guts of the FCA–the increased financial incentives and statutory guarantees passed by Congress in 1986.

Another factor justifying allowance of the writ is that the rational basis test, now set in stone, was the result of a hasty, ill-conceived and abrupt reversal of the longstanding construction of § 3730(c)(2)(A) by USDA[9] and DOJ[10] that it did not provide an independent basis to seek dismissal. Had the Government had this authority in the past, bona fide relators would have been unable to vindicate their rights, as the cases would have simply been dismissed. *See, e.g., U.S. ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1993).

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9. An internal USDA memorandum, and USDA Associate General Counsel Golden's testimony, explain that USDA did not believe § 3730(c)(2)(A) provided an independent basis to seek dismissal. App. 39a-40a.

10. *See, e.g.*, 11 Op. Off. Legal Counsel, DOJ 248 at * 10, * 17, * 25-26 ("[T]he provisions permit a private citizen to sue on behalf of the Government, even though the Attorney General may have decided not to prosecute the claim. This power removes from the Executive Branch the prosecutorial discretion that is at the heart of the President's power to execute the laws. Second, the qui tam provisions vest in the relator a voice in crucial litigation decisions, even if the Attorney General decides to enter the suit. The Attorney General may not move to dismiss the suit, settle the action, or restrict the relator's participation except by permission of the court. . . . When a dispute arises between the Attorney General and the relator, the ultimate decision is left to the discretion of the court."); Statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, U.S. Dept. of Justice, Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, False Claims Act Technical Amendments Act of 1992, H.R. 4563, April 1, 1992, at 7, 24-26 ("In sum, when a case is truly frivolous or presents no evidence, we believe that we have authority unilaterally to dismiss it. Clarifying legislative changes could be made that would eliminate the need for us to litigate this issue.").

CONCLUSION

The writ should be granted for the reasons set forth above. The erroneous decision in these cases present questions of overwhelming national importance to the construction and operation of the FCA.

Respectfully submitted,

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